

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**HELEN LOREE KNOLL**

Claimant

V.

**U.S.D. 233**

Self-Insured Respondent

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Docket No. 1,058,485

**ORDER**

Respondent requested review of the February 3, 2016, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on June 9, 2016, in Lenexa, Kansas.

**APPEARANCES**

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Kip A. Kubin, of Leawood, Kansas, appeared for self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found, as he had previously ruled in a May 4, 2015, Order, that this case was not subject to dismissal for lack of prosecution until five years from the date the claimant filed the Application for Hearing, pursuant to the version of K.S.A. 44-523(f) in effect for injuries suffered prior to May 15, 2011. The ALJ determined that date of accident controls which version of K.S.A. 44-523(f) applies.

Respondent appeals, arguing the date of the filing of the Application for Hearing is the date that triggers which version of the statute controls, not the date of the accident. Therefore, claimant is out of time to pursue her claim because, as of the date of the filing of the Application for Hearing, the three-year statutory limitation period was in place. Respondent contends the appeal should be dismissed.

Claimant argues the ALJ's Award should be affirmed.

The issue on appeal is which version of K.S.A. 44-523(f) applies in this matter.

### **FINDINGS OF FACT**

Claimant suffered a work-related accident on October 29, 2009. She began receiving medical treatment, undergoing surgeries to her right knee and right hip, and was still undergoing medical evaluations and/or treatment into 2015.

Effective May 15, 2011, K.S.A. 44-523(f) was amended to reduce the time limit for an injured worker to proceed to a regular hearing, a settlement hearing, or an agreed award under the Workers Compensation Act (Act) from five years to three years. Even though claimant suffered a work-related accident on October 29, 2009, her Application For Hearing was not filed until November 17, 2011.

On March 4, 2015, claimant filed a motion requesting an extension of time under K.S.A. 44-523(f). This Motion was filed more than three years after the filing of the Application For Hearing, but less than five years from that filing. Claimant contends the pre-May 15, 2011, version of K.S.A. 44-523(f), with its five-year limitation applies to this matter. Respondent contends, as claimant filed her Application For Hearing after the statute was amended to a three-year limitation, the more recent version of the statute applies and its motion to dismiss should be granted.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2009 Supp. 44-523(f) states:

(f) Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

K.S.A. 2011 Supp. 44-523(f) states in part:

(f)(1) In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's

last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

K.S.A. 44-505(c) states:

This act shall not apply in any case where the accident occurred prior to the effective date of this act. All rights which accrued by reason of any such accident shall be governed by the laws in effect at that time.

Respondent contends claimant's case should be dismissed because claimant failed to file her motion for an extension before the three-year period under K.S.A. 44-523(f) expired. Respondent argues the more recent version of the statute should apply as claimant filed her Application For Hearing after the statutory amendment in 2011. Respondent discusses whether the statute is substantive or procedural, but contends it is irrelevant in this instance as, with the filing of the Application For Hearing after the statutory modification, that determination becomes unnecessary.

Claimant contends the pre-2011 version of the statute should be used as the date of the accident controls which version of a statute applies in workers compensation litigation.

The Kansas Supreme Court, in *Bryant*<sup>1</sup>, noted the new law, in effect as of May 15, 2011, introduced several, what the Court called "exclusions from compensability". The Court of Appeals, in *Welty*<sup>2</sup>, noted that the right to compensation accrues from the "date of injury", citing *Kimber*.<sup>3</sup>

The Board finds the version of the statute in effect on the date of the injury applies and claimant had five years within which to file her motion for extension. The denial by the ALJ of respondent's motion to dismiss is affirmed.

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<sup>1</sup> *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

<sup>2</sup> *Welty v. U.S.D. No. 259*, 48 Kan. App. 2d 797 (2012).

<sup>3</sup> *Kimber v. U.S.D. No. 418*, 24 Kan. App. 2d 280, 282, 944 P.2d 169, *rev. denied* 263 Kan. 886 (1997).

The Board notes that, if the date of accident is the triggering event, respondent still appears to argue the statute may apply retroactively as a statute of limitations. However, both the Supreme Court in *Bryant*<sup>4</sup>, and the Court of Appeals in *Welty*<sup>5</sup>, limit the retroactive application of a statute to situations where the Legislature intended such an application to apply, and even then, only if the vested or substantive rights of an injured worker are immune from retrospective statutory application. The Board finds no indication by the Legislature that K.S.A. 2011 Supp. 44-523(f) was intended to apply retroactively. Additionally, that application would directly affect claimant's substantive right to compensation in this instance.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant's motion for an extension under K.S.A. 44-523(f) was timely filed. The version of the statute in effect on the date of the injury applies.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 3, 2016, is affirmed.

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<sup>4</sup> *Bryant*, 292 Kan. at 588.

<sup>5</sup> *Welty*, 48 Kan. App. 2d at 802.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge